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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 413

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE OHIO POWER COMPANY

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Sixth Circuit, entered July 25, 1949 (R. 169), which set aside the Board's order against The Ohio Power Company.

OPINIONS BELOW

The opinion of the court of appeals (R. 170–174, is reported at 176 F. 2d 385. The findings of fact, conclusions of law and order of the Board issued August 10, 1948 (R. 97–107, 134–136), are reported in 78 N. L. R. B. 1134. The Board's amended decision issued December 17,

1948 (R. 137–146), as amended January 11, 1949 (R. 147), is reported in 80 N. L. R. B., No. 205. The Board's decision and direction of election in a prior representation case, which forms part of the record in this case (R. 33–38), is reported in 73 N. L. R. B. 384.

JURISDICTION

The decree of the court of appeals was entered on July 25, 1949. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The question presented is whether the phrase "authority * * * responsibly to direct" the work of other employees, which appears in Section 2 (11) of the National Labor Relations Act, as amended, requires the Board, as a matter of law, to classify the control operators involved in this case as "supervisors" rather than as "employees" within the meaning of Section 2 (3).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are set forth in the Appendix, *infra*, pp. 35–40.

STATEMENT

Pursuant to a petition filed on November 12, 1946, by Utility Workers of America, C. I. O., hereinafter called the Union (R. 1–2), the Board conducted a hearing, and on April 14, 1947, issued its Decision and Direction of Election in which it found (R. 37), that "all regular employees of the [Ohio Power Company's] Tidd plant, including *control operators,* stores attendants and janitors, but excluding guards, clerical employees, construction employees, probationary employees, part-time employees, laboratory tester, chemist, junior chemist, test engineer, junior test engineer, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act" [emphasis supplied]. At the hearing the Company had contended that the control operators, four in number, were "supervisory" employees and should therefore be excluded from the unit. The Board found, however (R. 35–36), that control operators were "part of the regular operating force" at the Tidd plant, that they were not supervisors within the Board's customary definition, and that they should therefore be included in the unit.

On May 13, 1947, pursuant to the Board's direction, an election was conducted among the

forty-two operating and maintenance employees comprising the unit found appropriate by the Board (R. 38). Twenty-two votes were cast for the Union and twenty against. Accordingly, the Board on June 10, 1947, certified the Union as exclusive bargaining representative of the employees in the unit (R. 38–39). The Company, challenging the validity of the Board's inclusion of control operators in the unit, refused to honor the Board's certification and refused the Union's request for recognition as exclusive bargaining representative (R. 134, 103–104; 53, 59, 86–87, 94–96).

Upon the usual proceedings pursuant to Section 10 of the Act, the Board on August 19, 1948, issued its Decision and Order, in which it found that the Company had refused to bargain collectively with the Union in violation of Section 8 (a) (1) and 8 (a) (5) of the Act, as amended,[1] and ordered the Company to take appropriate remedial action (R. 134–136).[2] On December

[1] The amendments to the National Labor Relations Act became effective on August 22, 1947. Section 104 of the Labor Management Relations Act, 1947 (*infra*, p. 40).

[2] In this decision the Board did not pass upon the question whether, as the Company urged, control operators are "supervisors" within the meaning of Section 2 (11) of the Act, as meanwhile amended in August 1947. It stated that the certification, having issued prior to amendment of the Act, remained valid by virtue of Section 103 of the Labor Management Relations Act, 1947 (*infra*, pp. 39–40), regardless of the subsequent amendment which excluded "supervisors," as defined by Section 2 (11), from the scope of the Act (R. 134, 102, n. 4).

17, 1948, the Board issued its amended decision in which it found that the control operators are not supervisors within the meaning of Section 2 (11) of the Act, as amended, and that their inclusion in the unit of operating and maintenance employees therefore remained proper (R. 137–146).[3]

I

The Board's findings as to the duties and status of control operators

The Board's subsidiary findings and the supporting evidence may be summarized as follows:[4]

The Tidd plant of the Ohio Power Company, the only plant involved in this proceeding, is a highly automatized steam electric generating plant which operates on an around-the-clock basis (R. 35; 21, 84). At the time of the hearing in the representation case only thirty-nine or forty operating and maintenance employees, including the four control operators whose status is here in issue, were employed at the plant (R. 26). Each of the four control operators works one

[3] By its amended decision the Board withdrew its prior determination that Section 103 preserved the validity of the certification and stated that in view of its findings that control operators are not supervisors within the meaning of the amended Act it was unnecessary to rule on the applicability of Section 103 to the case (R. 138–139).

[4] In the following statement, whenever a semicolon appears, record references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

forty-two hour shift each week; one is thus on duty at all times (R. 84). Because of the high degree of centralization of controls at the Tidd plant, the one control operator on duty each shift can, from the control room, regulate the performance of practically all pieces of operating equipment (R. 35, 101; 16–17, 21).

Each of the four control operators is assisted on his shift by an assistant control operator and an auxiliary equipment operator (R. 35; 21–23). The control operator and his two assistants work under the supervision of a shift operating engineer (R. 35, 101; 18, 26, 31, 78–80). The shift operating engineer is present in the plant at all times, spends some of his time in the control room, and issues orders directly not only to the control operator but to the assistant control operator and auxiliary equipment operator as well (*ibid.*). The shift operating engineer is in direct charge of and is directly responsible for operations on his shift (R. 76, 79). He is supervised by the operations supervisor, who, in turn, is subject to supervision by the plant superintendent (R. 35; 18, 79–80).

The control operator, whose duties are closely analogous to those of a stationary engineer in an industrial power plant, and who must possess a stationary engineer's license, works more than 95 percent of his time in the control room (R. 35, 101; 16, 31–32, 77). There he performs operating, regulating and adjusting duties in maintaining

proper control of water levels, pressures, temperatures, draft conditions, and output of high pressure boilers, to insure maximum efficiency and correct output of the unit (R. 35; 31–32). He controls, operates and synchronizes, by means of push buttons or switches, the performance of turbines, condensers, generators, transformers and other auxiliary equipment. He takes and records readings and changes charts. He controls and operates switching equipment. He is responsible for keeping equipment and working areas in the control room in a clean and orderly condition (*ibid.*). During the remaining portions of his time he inspects equipment in, or removes equipment from, service (R. 32). Control operators, who were the highest rated hourly employees in the plant (R. 35; 29), were transferred to a salary basis after the Board's decision in the representation case (R. 140; 68, 75).

The assistant control operator spends fifty percent of his time in the control room assisting the control operator and receiving instructions in control of the unit; the other fifty percent of his time is spent in making tours of inspection of operating equipment under established routine and in checking particular equipment when defects are suspected (R. 35; 22, 77). The assistant control operator normally progresses in time to the position of control operator (R. 24). The auxiliary equipment operator's duties consist of operating revolving screens, running ashes, in-

specting fans on top of boilers, periodically visiting various parts of the plant to inspect auxiliary equipment, and making additional inspections of particular equipment when necessary (R. 35; 23). The control operator has nothing to do with the employment, discharge or discipline of the assistant control operator and auxiliary equipment operator (R. 26; 23, 28).

In emergencies when unusual adjustments must be made immediately, if the shift operating engineer is not present in the control room, the control operator will make the necessary adjustments himself (R. 101; 26, 78–79, 81). However, in these cases, at the earliest opportunity, he notifies the shift operating engineer of the difficulty by announcement over the plant public address system (R. 101; 78–79). If inspections or minor adjustments outside the control room are necessary the shift operating engineer, or, in his absence, the control operator, directs either the assistant control operator or the assistant auxiliary equipment operator to inspect the equipment and make the necessary adjustments (R. 35, 101; 21, 22, 26, 29, 77, 81).

Occasionally difficulties arise in connection with the functioning of various pieces of equipment which cannot be handled by mere manipulation of controls in the control room (R. 141, 145; 70, 76). In such cases, for example, when the coal has frozen and does not feed properly into the boilers, the control operator, in the absence of the shift oper-

ating engineer, is authorized to requisition men from the maintenance gang to assist in breaking up the coal and keep it moving into the chutes (R. 101, 141; 70, 76). He announces the difficulties over the public address system and directs the available men to break up the coal (R. 79, cf. 75).

However, these maintenance men, who perform repair work in the control room as well as throughout the plant, work under the supervision of the maintenance foreman (R. 77). In other than emergency situations, if repairs are needed in the control room, the control operator advises the shift operating engineer, who, in turn, requisitions the services of maintenance men by a work order issued to the maintenance department (R. 101; 77).

II

The Board's conclusions

On the basis of the foregoing facts the Board in its amended decision found that control operators are not "supervisors" within the meaning of Section 2 (11) of the amended Act, which reads as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust

> their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board found that control operators are not empowered directly to change the status of employees or effectively to recommend changes in their status (R. 35–36, 145). It further found that they do not have authority "responsibly to direct" employees, when that phrase is read in the light of the meaning attached to it by Congress (R. 146). Consideration of the legislative history of the phrase, and the reason for its incorporation in Section 2 (11), led the Board to conclude that (R. 143), "the broad scope implied in a literal construction of the authority 'responsibly to direct' was not intended by Congress, but rather that a specific qualified meaning was attached to this phrase."

The Board noted (R. 143) that Senator Flanders, sponsor of this provision, stated (93 Cong. Rec. 4678) that it was intended to reach only those supervisors who "are above the grade of straw bosses, lead men, set-up men, and other minor supervisory employees." Recognizing that supervisors who exercised any of the other enumerated powers would by that token alone be excluded (R. 142–143), the Board noted (R. 144) that "individuals having the authority 'respon-

sibly to direct' contemplated in Section 2 (11) fall within a narrow area lying between those 'above the grade of straw bosses, lead men, set-up men and other minor supervisory employees,' and those who do not possess *any* of the other specific authorities enumerated in the Act's definition."

Turning to the control operators in the instant case, the Board declared (R. 146), that "the immediate and substantially constant supervision exercised [over the control operator, assistant control operator and auxiliary equipment operator] by each shift operating engineer, who, in turn, is supervised by the operations supervisor and the plant superintendent" convinced it that the control operators did not have the power "responsibly to direct" the assistant control operator and auxiliary equipment operator within the intent of the amended Act's definition of "supervisor."

The Board also held (R. 145) that the relation between control operators and maintenance employees during emergencies was not such as to make the control operators "supervisors" of the maintenance employees within the meaning of the amended Act. The Board pointed out (R. 145) that even if the nature of the authority exerted over these employees by control operators during emergencies were assumed to be "supervisory," the occasions on which this authority was called into play were "sporadic and infrequent" and

therefore insufficient to justify classifying control operators as supervisors under the amended Act.

III

The decision in the court below

On September 7, 1948, the Company filed in the court below a petition to set aside the Board's order insofar as it required the Company to bargain with the Union as representative of the control operators (R. 147–159). On July 25, 1949, the court issued its opinion (R. 170–174), and on the same day entered its decree (R. 169), in which it set aside the Board's order, and directed that the Board's certification be amended "by excluding control operators from such unit."

The court concurred in the Board's conclusion that the control operators exercise none of the powers to *alter* the status of other employees which are enumerated in Section 2 (11) of the Act (R. 172). The court held, however, that control operators are supervisors within Section 2 (11) because they do "responsibly direct" the work of other employees (R. 172).

The court rejected the Board's construction of the phrase "responsibly to direct" on two grounds. It held first, that the phrase was clear and unambiguous; that "no absurd or futile results or unreasonable effects 'plainly at variance with the policy of the legislation as a whole' are produced by following the plain meaning

of the Act;" and that resort therefore could not be had to legislative history as an aid in its interpretation and application (R. 173). It held secondly, that even if cognizance could be taken of legislative history, it did not support the Board's position that a specific qualified meaning had been attached to the phrase (R. 172). In the court's view Senator Flanders' remarks indicate only that he sought to exclude all employees who "engage regularly" in "the basic act of supervising" (R. 172).

The court held that control operators satisfy the "responsibly direct" criterion for two reasons: first, because "the control operator at all times responsibly directs the assistant control operator and the auxiliary equipment operator" (R. 173); second, because "He has authority in time of emergency to requisition any men on the spot, in fact, to direct the activities of substantially all the employees at the Tidd plant, and has on various occasions used this authority" (R. 173–174). The court rejected the Board's view that the shift operating engineer, not the control operator, is the immediate "supervisor" of the assistant control operator and auxiliary control operator. It held that "the fact that the shift operating engineer is superior to the control operator" is "immaterial" (R. 174). The court also held that the Board has "erred as a matter of law" in adopting the view that exercise

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of supervisory authority on "sporadic or infrequent" occasions was insufficient to warrant classifying a worker as a "supervisor" rather than as an "employee" (R. 173). The phrase "having authority * * * responsibly to direct," said the court, "does not require the exercise of the power described for all or any definite part of the employee's time. It is the existence of the power which determines the classification" (R. 173).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that control operators are "supervisors" within the meaning of Section 2 (11).

2. The court below erred in setting aside the Board's order.

REASONS FOR GRANTING THE WRIT

1. The instant case is the first in which the propriety of the Board's construction of the phrase "responsibly to direct" other employees, as used in Section 2 (11) of the amended Act, has been passed upon by a court of appeals. The question presented by the court's rejection of the Board's construction and its holding that the phrase must be given what it conceived to be a literal application is of substantial importance in the Board's administration of the Act. It arises frequently in representation proceedings in which the Board must determine whether particular types of employees who themselves perform

operating functions and who satisfy none of the other statutory criteria are nevertheless to be held "supervisors" and excluded from bargaining units, either because they direct the work of assistants, apprentices, or helpers, or because on infrequent and sporadic occasions they perform supervisory functions. The decision below, if unreviewed, puts in question the statute's application to large numbers of employees who have never been considered "supervisors" in common industry parlance, and whose status as "employees" under the Act has never heretofore been doubted. Such doubts, unless promptly resolved, may reasonably be expected to promote industrial disputes and to give rise to a large volume of additional litigation before the Board.

As appears from the Statement, the control operators here involved are clearly not supervisors in the conventional sense. Their job is an amalgam of the jobs of boiler operator, turbine operator, and pump operator in less automatized plants (R. 35; 16–17, 21, 25).[5] The sole difference between the job of a boiler operator or a turbine operator at a nonautomatized plant and a control operator at an automatized plant lies in the number,

[5] The job performed in less automatized plants by the switchboard operator is also, in part, performed by the control operator at automatic plants (R. 35; 17). See Sporn, Philip, *Tidd Generating Station Is Both Efficient and Economical*, Electrical World (August 2, 1947), pp. 60, 62.

diversity and greater handling simplicity of units which the control operator is able to regulate (cf. R. 25).[6]

Boiler operators, turbine operators, pump operators and switchboard operators are uniformly regarded as rank and file workers, despite the fact that they direct the work of their assistants and helpers[7] and exercise important responsibilities in emergencies.[8] The Company witness in this case so testified (R. 17). The Board has generally included them in rank and file bargaining units.[9] Labor organizations have traditionally bargained for this type of employee.

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[6] Sporn, Philip, *op. cit. supra*, note 5. Langstaff, H. A. P., *Security Through Flexibility Marks Mitchell Electrical Design*, Electrical World (July 2, 1949), pp. 55, 56–57.

[7] Department of Labor, Bureau of Labor Statistics, Bull. No. 944, *Employment Outlook in Electric Light and Power Occupations*, pp. 32–33; *Dictionary of Occupational Titles, Vol. I*, U. S. Employment Service, Fed. Sec. Agency, U. S. Gov't Print. Office, 1949, p. 1432.

[8] The *Dictionary of Occupational Titles* notes as one of the tasks of boiler operator II, the making of manual adjustments for "*fuel feed*, dampers, valves and other controls * * * in emergencies" (italics added). *Dictionary of Occupational Titles, Vol. I*, U. S. Employment Service, Fed. Sec. Agency, U. S. Gov't Print. Office, 1949, p. 116. See also, Samuels, M. M., *Power Unleashed*, Dorsett House, Inc., New York, 1943, pp. 236–237.

[9] See, e. g., *Matter of Florida Power Co.*, 59 N. L. R. B. 1493; *Matter of Boston Edison Co.*, 51 N. L. R. B. 118; *Matter of Lynn Gas and Electric Co.*, 78 N. L. R. B. 3, 7; *Matter of Texas Electric Service Co.*, 77 N. L. R. B. 1258.

While the automatization effected at the Tidd plant, and at other modern electric generating plants,[10] has resulted in elimination of boiler operators, turbine operators, auxiliary equipment operators and switchboard operators, "the core of the power plant staff," [11] it has not resulted in any change in the supervisory structure traditional in the industry. Traditionally, "Supervision of the operations is handled by the chief engineer in charge of the plant and by the watch [or shift] engineers under him." [12] At the Tidd

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[10] The Tidd plant is not unique in its centralization of control in the hands of a control operator and his assistants. On the contrary, this feature is currently being incorporated in many power plants recently constructed or in process of construction. See, *e. g.*, *Sewaren Adopts 1050 F Steam*, Electrical World (August 13, 1949), pp. 87, 89; Gillespie, R. D., *The New O. H. Hutchings Station*, Combustion, January 1949, pp. 28, 32; Benson, A. A., *New 160,000 KW White River Generating Station of Indianapolis Power & Light Co.*, Combustion, May 1949, pp. 26, 30; Burns, W. J., *Port Jefferson Power Station of the Long Island Lighting Co.*, Combustion, February 1949, pp. 34, 39; *Control is Centralized At Kern Station*, Electrical World, September 25, 1948, pp. 90–91; Sporn, Philip, *One Thousand F. . . . A New High in Steam Temperature*, Electrical World, August 17, 1946, pp. 60, 66; Langstaff, H. A. P., *Security Through Flexibility Marks Mitchell Electrical Design*, Electrical World, July 2, 1949, pp. 55–57.

[11] *Employment Outlook in Electric Light and Power Occupations*, *op. cit. supra*, note 7, p. 32.

[12] *Ibid.* The article goes on to state (p. 34): "The principal supervisory workers in a power plant are the watch engineers. They supervise the employees responsible for the operation and maintenance of boilers, turbines, generators,

plant supervision is handled by the plant superintendent, the operations supervisor, and the shift operating engineers. The one operating engineer on duty each shift is responsible to the operations supervisor (R. 35; 18, 79–80). There is thus no reason to believe that automatization of the plant has changed the operating employees into supervisors.

In holding that control operators are supervisors the court below applied standards which appear to exclude from the coverage of the Act craftsmen who have helpers, assistants or apprentices; individuals who on infrequent and irregular occasions substitute for a supervisory employee; stationary engineers in industrial plants; load dispatchers, switchboard operators, boiler operators, and turbine operators in all electric utility companies; and numerous categories of employees in highly automatized plants in various other industries.

The craftsman who over the years has been the typical trade union member in the United States has traditionally been assisted by helpers and apprentices whose work he directs. Some craftsmen direct the work of as many as six or more helpers. The direction of helpers and apprentices normally involves the exercise by the

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auxiliary equipment, switchboards, transformers, and other machinery and equipment. Directly over the watch engineers may be a plant superintendent, who is in general charge of the entire plant."

craftsman of independent judgment and his responsibility for the performance of the helper or assistant.[13] So far as we have been able to ascertain there is no Board case in which it has ever been contended that craftsmen should be classified as supervisors because of the direction they give to helpers, assistants and apprentices.

The holding of the court below that the power of control operators to give directions to maintenance employees in emergencies makes them "supervisors" would also exclude from the benefits of the Act employees who on infrequent and irregular occasions substitute for supervisors during their absences. The Board has uniformly held, both under the original Act,[14] and under the Act, as

[13] Millis, Harry A., and Montgomery, Royal E., *Organized Labor* (1945), pp. 450–453; Ashworth, John H., *The Helper and American Trade Unions*, Johns Hopkins University Studies, Series 33 (1915), pp. 9–15.

[14] *Matter of Union Switch & Signal Co.*, 63 N. L. R. B. 974, 978 (Clerk in stores department who exercises supervisory authority only at sporadic and infrequent intervals held not a supervisor); *Matter of Cole Instrument Co.*, 75 N. L. R. B. 348 (warehouse leadman who exercises supervisory authority "sporadically" held not a supervisor); *Matter of the Packers Association of Chicago, et al.*, 73 N. L. R. B. 627 (scaler in meat packing house who substitutes for foreman when the foreman is ill or on vacation held not a supervisor because he acts in place of the foreman only on infrequent and sporadic occasions); *Matter of The Adams & Westlake Co.*, 72 N. L. R. B. 726 (assistant to comptroller who acts for comptroller in his absence held not a supervisor); *Matter of Textile Machine Works, Inc.*, 72 N. L. R. B. 56 (job setters and leaders who act for foremen in the latter's absence held not supervisors); *Matter of Fred W. Mears*

amended,[15] that such employees are not "supervisors."

We have been unable to obtain any figures respecting the total number of craftsmen who have helpers, apprentices or assistants or the total number of employees who occasionally substitute for a supervisor. There are undoubtedly many hundred thousand such employees whose status under the Act is rendered doubtful by the decision below. There are at least 200,000 individuals employed in jobs involving the control of automatic equipment, the direction of assistants and the exercise of emergency powers, who have traditionally been regarded as not supervisors and who would be excluded from the Act

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Heel Co., 71 N. L. R. B. 18 (automatic turner and sample maker who occasionally substitutes for foreman held not a supervisor).

[15] *Matter of The Electric Auto-Lite Co.*, 76 N. L. R. B. 1189 (instructors and group leaders who spend most of their time in actual production but exercise "a certain measure of supervisory authority" when acting as instructors, held not to be supervisors); *Matter of Electrical Equipment Co.*, 76 N. L. R. B. 1060 (old and experienced employee who substitutes for plant superintendent in the latter's absence held not a supervisor).

under the decision below.[16] For instance, in 1940 there were 184,820 stationary engineers.[17] The Board in a number of cases has described the nature of their duties. From these cases it appears that it is customary for stationary engineers, assisted by firemen and helpers, whose work they direct, to regulate the operation of all the equipment in the powerhouse.[18] They are

[16] See table below:

Job classification	Industry	Number employed
Boiler Operator [a]	Electric power	[h] 5, 700
Load Dispatcher [b]	do	[h] 1, 500
Switchboard Operator [c]	do	[h] 5, 200
Turbine Operator [d]	do	[h] 4, 000
Boiler Operator [e]	Gas	[i] 615
Water Gas Maker [f]	do	[i] 689
Stationary Engineer [g]	Any	[j] 184, 820
Total		202, 524

[a] Department of Labor, Bureau of Labor Statistics, *op. cit. supra*, note 7, p. 32.
[b] *Ibid.*, p. 37.
[c] *Ibid.*, pp. 33–34.
[d] *Ibid.*, pp. 32–33.
[e] Dictionary, *op. cit. supra*, note 7, p. 116.
[f] *Ibid.*, p. 1470.
[g] *Ibid.*, p. 1273.
[h] Department of Labor, Bureau of Labor Statistics, *op. cit. supra*, note 7, p. 11.
[i] Mohn, Kermit B., *Electric and Gas Utilities: Wage Structures in 1948*, U. S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review, October 1948, pp. 377, 379, Table 2. These figures are not comprehensive for the industry. They cover only privately owned plants in cities of 75,000 population or more.
[j] *Population—Occupations of Employed Persons In Each Industry, For the United States: March 1940 (Release P-14, No. 11), 16th Census of the U. S.*: 1940, U. S. Department of Commerce, Bureau of the Census, March 6, 1943, pp. 208, 209, Table 19.

[17] *Population—Occupations of Employed Persons in Each Industry, For the United States: March 1940 (Release P–14, No. 11), 16th Census of the U. S.: 1940*, U. S. Department of Commerce, Bureau of the Census, March 6, 1943, pp. 208, 209, Table 19.

[18] Compare the description of stationary operating engineers in the Board's decision in *Matter of Washburn Wire Co.*, 79 N. L. R. B. 1479, 1480–1481; *Matter of Calcasieu Paper Co., Inc.*, 73 N. L. R. B. 344; *Matter of Youngstown Sheet and Tube Co.*, 71 N. L. R. B. 219, 238; Compare *I Dictionary of Occupational Titles*, U. S. Employment Service, Fed. Sec. Agency, U. S. Gov't Printing Office, 1949, p. 115, definition of "boilerhouse operator."

supervised, as is the control operator, by a supervisory employee, known variously as maintenance foreman, shift foreman, etc. Although they take charge in emergencies, in the absence of the supervisor,[19] these stationary engineers are uniformly recognized to be nothing more than "highly skilled employees * * * who are members of a traditional craft."[20] The Board, both under the original Act and under the Act, as amended, has included such employees in bargaining units,[21] and labor unions have traditionally represented them in collective bargaining.[22]

Automatization of equipment in the natural gas, and oil refining industries has produced jobs analogous to that of the control operator, in the sense that means of regulating virtually all equipment in a plant are vested in a single operator.[23] The trend in all industries is towards a

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[19] See, *e. g.*, *Matter of Calcasieu Paper Co., Inc.*, 73 N. L. R. B. 344, 346.

[20] *Matter of Washburn Wire Co.*, 79 N. L. R. B. 1479, 1480.

[21] *Matter of the Consumers Brewing Co.*, 77 N. L. R. B. 1244; *Matter of Curtiss-Wright Corp.*, 77 N. L. R. B. 803; *Matter of Kendall Mills*, 77 N. L. R. B. 385; *Matter of Kalamazoo Vegetable Parchment Co.*, 76 N. L. R. B. 1015.

[22] See American Management Association, Personnel Series No. 87, *The Foreman In Labor Relations*, American Management Association (1944), p. 31.

[23] See, definition of "Dehydrogenation Operator (petrol. refin.)." Compare with the definition of "Dehydrogenation Foreman (petrol. refin.)" which indicates that the supervisor-worker relationship there is much the same as that between the "shift-engineer" and the "control operator" in the electric generating plant. *I Dictionary of Occupational Titles*,

higher degree of automatization. The instant case therefore presents issues which will become increasingly important in the administration of the Act.

It is important to the Board, as well as to the public generally, to know whether skilled craftsmen, who have repeatedly been included in bargaining units with their helpers and assistants, employees who exercise supervisory authority only on sporadic and infrequent occasions, and operators in automatized plants who have also heretofore been included in bargaining units, must, under the amended Act, be held to be "supervisors" and denied statutory protection. The significance of this case therefore far transcends the particular employees here involved.

U. S. Employment Service, Fed. Sec. Agency, U. S. Gov't Printing Office, 1949, p. 374. See definition "Dispatcher (petrol. production; petrol. refin.; pipe lines) II," (Dictionary, *op. cit. supra*, at p. 397). Cf. *Matter of Southern California Gas Co.*, 10 N. L. R. B. 1123, 1140. Compare with "Dispatcher, Chief (petrol. production; petrol. refin.; pipe lines) II," definition (Dictionary, *op. cit.*, at p. 397). See also definition of "Dispatcher (tel. & tel.) I, cable dispatcher" (Dictionary, *op. cit.*, at p. 397).

See definition of "Gas Treater" (Dictionary, *op. cit.*, at p. 599), also definition of "Dehydration-Plant Operator (petrol. refin.)" (Dictionary, *op. cit.*, p. 374); "Water-Gas Maker (light, heat, and power)" (Dictionary, *op. cit.*, at p. 1470); "Coal-Pulverizer Operator (any ind.)" (Dictionary, *op. cit.*, at p. 278); "Absorption Plant Operator (petrol. refin.)," (Dictionary, *op. cit.*, at p. 1). Cf. *Matter of Shell Oil Co. of California*, 2 N. L. R. B. 835, 844.

2. We believe that the court below erred in rejecting the Board's interpretation of Section 2 (11).

At the outset it should be noted that for a number of years prior to enactment of the amendments to the Act the Board had excluded "supervisors" from bargaining units of rank and file employees.[24] As stated in the Board's Tenth Annual Report (Gov't Print. Off., 1946), p. 34, it was the Board's "long established rule that supervisory employees who are vested with the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, are not properly included in bargaining units comprising their subordinates." Pursuant to this policy the Board consistently included in bargaining units of rank and file workers craftsmen who direct the work of their helpers,[25] employees who exercise supervisory powers only on sporadic or infrequent occasions,[26] instructors,[27] and minor supervisors.[28] The Board did

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[24] See National Labor Relations Board, Eighth Annual Report, Gov't. Print. Off., 1944, pp. 55–56.

[25] Notes 5, 9, 18–21, *supra.*

[26] Notes 5, 14–15, *supra.*

[27] *E. g., Matter of Armstrong Tire & Rubber Company*, 61 N. L. R. B. 1503; *Matter of E. I. du Pont de Nemours & Company*, 62 N. L. R. B. 146; *Matter of The Firestone Tire & Rubber Company*, 69 N. L. R. B. 634; *Matter of Perfection Garment Company*, 72 N. L. R. B. 210.

[28] See, *e. g., Matter of The Bunting Brass and Bronze Company*, 63 N. L. R. B. 818; *Matter of The Schaible Com-*

not consider or treat such employees as "supervisors" within the meaning of its definition at all.

The controversy which developed as a result of the Board's decision in *Matter of Packard Motor Car Co.*, 61 N. L. R. B. 4, 64 N. L. R. B. 1212, enforced, 157 F. 2d 80 (C. A. 6), affirmed, 330 U. S. 485, revolved entirely about the question whether those employees who were treated as supervisors by the Board should be accorded statutory protection in their efforts to organize and bargain collectively in units separate and distinct from those containing their subordinates. No criticism was voiced of the Board's customary definition of "supervisor" or of its practice of including in rank and file bargaining units employees who did not satisfy that definition.[29]

The legislative history shows that the purpose of Congress in amending the Act by excluding from the definition of "employee" in Section 2 (3), "any individual employed as a supervisor" was to change the rule of the *Packard* case. See, H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., pp. 13–17; S. Rep. No. 105 on S. 1126,

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pany, 69 N. L. R. B. 527; *Matter of John Deere Dubuque Tractor Company*, 72 N. L. R. B. 656, 662; *Matter of Pittsburgh Equitable Meter Co.*, 61 N. L. R. B. 880; *Matter of The Richards Chemical Works, Inc.*, 65 N. L. R. B. 14; *Matter of Endicott Johnson Corp.*, 67 N. L. R. B. 1342, 1347.

[29] Cf. National Labor Relations Board, Tenth Annual Report (Gov't. Print. Off., 1946), p. 34; Eleventh Annual Report (Gov't. Print. Off., 1947), p. 31.

80th Cong., 1st Sess., pp. 3–5. Congress did not intend, however, to deprive of the benefits of the Act any employees except those who were traditionally regarded as supervisors. The object, as the Senate Committee put it, was to relieve employers of the obligation to accord to "the front line of management the anomalous status of employees." S. Rep. No. 105, 80th Cong., 1st Sess., p. 5.

The Senate bill, S. 1126, which excluded supervisors from the definition of employee,[30] proposed that the term "supervisor" be defined to include only "any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires

[30] The House bill, H. R. 3020, excluded not only "supervisors," as the term had theretofore been defined by the Board (Sections 2 (12) (A) (i)), but also time checkers and time study men (Section 2 (12) (A) (ii)); all persons employed in "labor relations, personnel, employment, police, or time study matters," claims investigators and adjustors, and any employee "employed to act in other respects for the employer" in dealing with other individuals employed by the employer (Section 2 (12) (B)); and persons who, in the course of their duties are entrusted by the employer with confidential information (Section 2 (12) (c)). The Senate, however, refused to adopt the House proposal, and the Senate's views prevailed (H. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess., p. 35). It is significant to note that the House bill, as well as the Senate bill, adopted the definition of supervisor which had been formulated and applied by the Board.

the use of independent judgment." The Senate Committee explained that it limited the definition to employees exercising these major managerial powers because it did not desire to exclude minor supervisors from the benefits of the Act. Its report (S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 4), states that: "In drawing an amendment to meet this situation the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand,[31] and the supervisor vested with

[31] The Dictionary of Occupational Titles states that "Straw boss" and its synonyms, "expediter; gang foreman; gang leader; gang pusher; group leader; head; leader; leadman, gang; lead-off man; pacer; pusher," is "A term applied to a worker who takes the lead in a team or gang, usually small in number, including himself, performing all the duties of the other workers in the gang. His supervisory functions are incidental to the production duties he performs." *I Dictionary of Occupational Titles*, (Gov't. Print. Off., 1949), p. 1308. The same source states that the term "section leader" is "used * * * to designate technical personnel who supervise groups of other workers performing same duties. May perform the more difficult tasks." (*Ibid.*, at p. 628. See definition of Group Leader petrol. prod.; petrol. refin.). Set-up men adjust machines until accurate production based upon blueprint specifications, patterns or templates has been achieved, and then turn the machine over to the regular operator, often giving instructions as to the proper performance. They periodically check production with precision gauges. See *ibid.*, p. 718, "Job Setter (Mach. shop) * * * set-up man; * * *."

such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action."[32]

When the Committee bill reached the floor of the Senate, Senator Flanders proposed that the definition of "supervisor" be amended to include among the major attributes of supervision, the power "responsibly to direct" the work of others. He proposed the amendment to correct what he regarded as a deficiency in the Committee definition which might permit actual foremen to be accorded the status of employees under the Act. He stated (93 Cong. Rec. 4677–4678):

> As an employer for many years past, and until I resigned to enter this body, I can say that the definition of "supervisor" in this act seems to me to cover adequately everything except the basic act of supervising. Many of the activities described in paragraph (11) are transferred in modern practice to a personnel man-

[32] Compare Monk, Ralph M., *A Company Program for Foremen*, Personnel Series No. 96, American Management Association (1945), pp. 21, 22. There, after describing "foremen" as "managers of their departments," the author states: "Unless we are talking about a person who meets that definition, one who manages 20 to 50 employees, the chances are we are talking about an employee often referred to as a leadman, straw boss, pusher or one of a host of other similar titles. As such, he is not a member of management in the strict sense of the word." See also, American Management Association, Research Report No. 7, *The Development of Foremen in Management* (1945), pp. 14–15.

ager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, transfer a worker to another department on other work instead of discharging, disciplining or otherwise following the recommended action.

In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the workers to whom they are assigned.

Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees," as enumerated in the report. Their essential managerial duties are best defined by the words "direct responsibly," which I am suggesting.

In the light of Senator Flanders' explanation that his amendment was offered to cover situations in which foremen and other major supervisors had lost authority to make "effective" changes in the status of subordinate employees,

and that the amendment would not affect the objective of the Committee to leave intact the Board's practice of including minor supervisors in rank and file bargaining units, Senator Flanders' clarifying amendment was adopted virtually without debate.[33] Senator Flanders' statement indicates that he agreed with the proposal of the Committee that the Board's practice of including "straw bosses, leadmen, set-up men, and other minor supervisory employees," in units of production workers should be continued and that it was not the purpose of his amendment to exclude such employees, despite the fact that they clearly do direct the work of others. It is clear in the light of this background and explanation that the words "responsibly to direct" were not meant to reach employees who had helpers for whose work they were in a sense responsible. The phrase was used with a connotation of responsibility at a higher level. And this is what the Board has held.

The holding of the court below, that the Board's resort to legislative history for aid in determining the construction to be placed upon

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[33] Senator Taft commented on Senator Flanders' proposed amendment as follows:

"Mr. President, this merely adds to the definition of the word 'supervisor.' The definition [of 'supervisor'] in the [Senate] bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years; but I have no objection certainly to including the words 'or responsibility [sic] to direct them' * * *" 93 Cong Rec. 4678.

the phrase "responsibly to direct" was improper because the words themselves are "plain and unambiguous," conflicts in principle with the holding of this Court in *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479, that "there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.'" See also, *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U. S. 755; *Markham* v. *Cabell*, 326 U. S. 404, 409; *United States* v. *Dickerson*, 310 U. S. 554, 561–562; *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 542, 544; *United States* v. *United Mine Workers*, 330 U. S. 258, 309; compare Judge Learned Hand's concurring comment in *Guiseppi* v. *Walling*, 144 F. 2d 608, 624 (C. A. 2): "There is no surer way to misread any document than to read it literally." The fact that the phrase "responsibly to direct" is not a term of art, that it had acquired no fixed or settled meaning in a personnel or labor relations context and had not previously appeared in legislation on the subject, would seem of itself sufficient to warrant resort to legislative history to determine the meaning which Congress attached to the phrase.

In holding that the results produced by following the "plain meaning" of the Act are not "absurd" or "futile" and do not conflict with the "policy of the legislation as a whole," the court below substituted its own conclusion for

the Board's contrary judgment that the results produced by giving the phrase "responsibly to direct" a "broad scope" would be unsound and would not accord with the policy of Congress. The Board's judgment was based upon its familiarity with job classifications and duties in industry generally, upon its experience in dealing with the problems involved in the many diverse factual situations presented in representation cases, few of which are ultimately reviewed by the courts of appeals, and upon its awareness of the nature of the issue which Congress sought to resolve by excluding supervisors as defined in Section 2 (11), from the purview of the term "employee" as defined in Section 2 (3). Substitution by the court below of its own judgment seems inconsistent with the principles enunciated by this Court in *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, 130–131; *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 798; and *National Labor Relations Board* v. *Stowe Spinning Co.,* 336 U. S. 226, 231–232, regarding the respective roles of the Board and of the courts in construing specific provisions of the Act. Cf. *Gray* v. *Powell,* 314 U S. 402, 412–413.

Indeed, we think it not unfair to say that the court's assumption that the phrase in question had a plain meaning as applied to the situation before it resulted from the court's unfamiliarity with and lack of expertness in the field. The

court's literal reading, as we have shown, results in defining as "supervisors", and excluding from the category of "employees" under the Act, a large group of workers who have never been considered "supervisors," either in common industry parlance or by the Board or the courts under the National Labor Relations Act (cf. *Roland Co.* v. *Walling,* 326 U. S. 657, 666), and whose exclusion finds no justification in any objective sought to be achieved by Congress in denying "supervisors" the protection of the statute. This consequence is sufficiently startling to warrant the Board's resort to legislative history to determine whether such an application comports with the objectives of Congress. Cf. *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 542; *United States* v. *C. I. O.,* 335 U. S. 106, 112; *Puerto Rico* v. *The Shell Co.,* 302 U. S. 253, 258.

CONCLUSION

The questions raised by the decision below are of substantial public importance. The decision deprives large numbers of employees of the benefits of the Act, contrary to the policy and purposes of Congress. The rules of statutory construction applied by the court below conflict, in principle, with the rules enunciated by this Court. It is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,
National Labor Relations Board.

OCTOBER, 1949.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

2. The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 2. When used in this Act—* * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust

their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of

appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record of the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any cir-

cuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

* * * * *

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of

such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

* * * * *

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

* * * * *

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